IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 361 of 1995

For Approval and Signature:

Hon'ble ACTING CHIEF JUSTICE MR.JN BHATT
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

TALAJI JAVANJI THAKORE & 2 OTHERS

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 361 of 1995

MS RV ACHARYA for Appellants No. 1-3

MR PR ABICHANDANI, APP for Respondent

CORAM : ACTING CHIEF JUSTICE MR.JN BHATT
and
MR.JUSTICE A.L.DAVE

Date of decision: 20/06/2003

ORAL JUDGEMENT

(Per : ACTING CHIEF JUSTICE MR.JN BHATT)

#. The appellants, who are the original accused persons, have assailed the judgment of conviction and sentence dated 22nd November, 1994, passed by the learned City Sessions Judge, Ahmedabad, in Sessions Case No.84 of 1994, under Section 302 read with Section 34 of the Indian Penal Code (hereinafter referred to as "the IPC"), which was initiated upon a criminal complaint given by one Karsanbhai Vihabhai Bharwad on 9.9.1993 at Odhav Police Station which was registered as C.R.No.I-270 of 1993, by filing this conviction appeal invoking Section 374 of the Code of Criminal Procedure. The appellants No.1 to 3 are the original accused Nos.1 to 3 and, therefore, they are hereinafter referred to, for the sake of convenience and brevity, as A1, A2 and A3 respectively. Upon the offence came to be registered, the investigation started and on completion of investigation, the chargesheet followed. The case was thereafter committed to the Court of Sessions being exclusively triable by Sessions Court. The Sessions Court framed charge at Ex.3 under Section 302 read with Section 34 of the IPC.

#. It has been the prosecution case that A1 is the son of A2 and son-in-law of A3, and that they formed a common intention to commit murder of one Bhimabhai Vihabhai Bharwad, and in pursuance of the said common intention, they went near the house of deceased Bhimabhai Vihabhai Bharwad, and at that time, A1 was armed with knife, A2 with stick and A3 with iron pipe. It has been the allegation of the prosecution that the accused persons, out of common intention, assisted each other at the time of incident which occurred at around 3:30 p.m. on 9.9.1993 at Masali Talavadi, near Lila Vahera, Ambica Nagar, Ahmedabad. The prosecution case further is that at about 3:00 p.m. on 9.9.1993, the complainant Karsanbhai Vihabhai Bharwad had gone to his younger brother's (deceased) house, and at that time, his brother and his brother's wife Jijiben were present. The complainant's brother was sitting in the front portion of the house whereas his brother's wife was preparing tea. It is also the case of prosecution that deceased Bhimabhai was putting up a window in one of the room situated on the back side portion of the house against the objection of A1. At that time, the accused persons came rushing near the house of the deceased from their house which is closer to the house of the deceased. There was a quarrel and the accused party raised objection and inquired from the brother of the

complainant as to why window was being placed on the spot which was very near to the house of A1. At that time, all of them got excited and entered into a scuffle with the deceased. Subsequently, all the three went back and appeared at the scene of offence equipped with weapons as aforesaid and started assaulting the deceased.

It is further the prosecution version that A1 Talaji Javanji Thakore gave two knife blows, A2 - Javanji Savaji Thakore gave stick blow on the back of the deceased and A3 - Bhaijibhai Chhanaji Thakore gave pipe blow on the head of the deceased. The deceased was shifted to hospital for treatment but he could not survive. The complaint was lodged by the brother of the deceased immediately after the incident.

#. The prosecution placed reliance on the evidence of the following witnesses:

a) PW 1 Karsanbhai Vihabhai Bharwad, the complainant at Ex.9

b) PW 2 Jijiben Bhimabhai Bharwad, widow of the deceased at Ex.12

c) PW 3 Dr.Vinayakrao Vasudevrao Patil at Ex.14

d) PW 4 Nanubhai Somabhai Bharwad, Panch Witness at Ex.15

e) PW 5 Babubhai Tapubhai Jhala, at Ex.24

f) PW 6 Amrutbhai Punaji Thakore, at Ex.25

g) PW 7 Satyanarayan Ramlaxman Sharma, P.I. (Investigating officer) at Ex.22

The prosecution also relied on the documentary evidence, to which reference will be made as and when required at an appropriate stage.

#. The learned trial Court, upon assessment, examination and evaluation of the prosecution evidence, documentary as well as viva-voce, reached to the conclusion that the accused persons are guilty for the murder of deceased Bhimabhai Vihabhai Bharwad. The learned trial Court therefore convicted the accused persons under Section 302 read with Section 34 of the IPC, and sentenced them to suffer imprisonment of life, by its judgment dated 22nd November, 1994, which is directly under challenge before us in this conviction appeal.

#. Since the accused pleaded their inability to engage a private lawyer, they have been provided advocate through Legal Aid. Ms.Rohini Acharya, learned advocate, appointed in defence of the accused under the Legal Aid Scheme, has taken us through material and relevant documentary as well as oral evidence. She has contended that there is no any evidence insofar as accused Nos.2 and 3 are concerned, whereas the evidence against A1 is not free from doubt so as to fix his culpability under Section 302 of the IPC. The submissions made on behalf of the accused are countenanced by Mr.P.R.Abichandani, the learned Additional Public Prosecutor, and he has supported the impugned judgment of conviction and sentence.

#. Insofar as the culpability of A1 is concerned, there is sufficient evidence to prove his presence and participation in the attack upon the deceased with knife, Muddamal article No.3. It is noticed by us that all the accused had gone near the house of the deceased. A1 was armed with knife, A2 was armed with stick and A3 was armed with an iron pipe. The prosecution case that A1 inflicted two knife blows upon the body of the deceased is succinctly established by the evidence of eye witnesses, namely, PW 1-Karsanbhai Vihabhai Bharwad, the complainant, at Ex.9 and PW 2-Jijiben Bhimabhai Bharwad, widow of the deceased, at Ex.12, and is also reinforced by the complaint which was promptly lodged by Karsanbhai Vihabhai Bharwad - the brother of the deceased. The medical evidence of Dr.Vinayakrao Vasudevrao Patil at Ex.14 also supports the evidence of eye witnesses on the main core and theme of the prosecution version. In our opinion, therefore, it is successfully proved and spelt out from the record that A1 inflicted two knife blows on the person of the deceased and one of which was on the chest which proved fatal, and A3 gave one blow with iron pipe on the head of the deceased, and there is no clear and consistent evidence, supported by the medical evidence, to prove infliction of blow by A2 with stick upon the deceased.

#. It has been submitted that there is some discrepancy about the number of blows and the order of blows in the evidence of two eye witnesses, and, therefore, the accused persons should be given benefit of doubt. The submission of this nature, howsoever prima-facie may appear to be alluring, is not acceptable. We are fully satisfied and convinced that the involvement, infliction of blows, and resultant homicidal death of deceased Bhimabhai Vihabhai Bharwad is established without any

doubt.

#. Now the question which falls for consideration is with regard to the nature of offence committed by A1 and A3, as there is no substantial, significant and acceptable evidence against A2. The prosecution case that the accused persons entertained a common intention, and in pursuance thereof, attack was made on the deceased, and fatal blow was given on the chest with knife, which culminated into homicidal death of deceased Bhimabhai, is not proved to the hilt. In other words, insofar as the version of formation of common intention or inference from the circumstances of a common intention to kill the deceased Bhimabhai by the accused persons is concerned, same is not proved beyond reasonable doubt. There is no significant and substantial material on record which can even remotely prompt us to infer formation of common intention by all the accused to commit murder of deceased Bhimabhai. Nonetheless, attack by A1 with knife and having inflicted two knife blows and one of them having been proved fatal can not be questioned as this part of the prosecution story has remained impeccable. The contention that A1 is entitled to acquittal on the ground that he lost his control because of sudden and grave provocation at the instance of the deceased as he was putting window in one of the rooms situated on the back side of his house which faced the house of A1, is not only half heartedly made but is required to be full heartedly rejected. It cannot be even said for a moment that the deceased had given incite or provocation which was grave and sudden in nature as a result of which A1 lost is self-control. We do not agree with this submission being far from truth and devoid of any merit. However, insofar as A1 is concerned, there is clear and consistent evidence to show that he inflicted two knife blows, one of which was on the chest, a vital part of the body and which proved fatal, and that too, after the deceased had fallen down on ground on account of infliction of pipe blow inflicted by A3. Not only this, thereafter also, A1 gave second knife blow. A person who is without any arms in a helpless condition having fallen down upon being inflicted a blow with iron pipe, is inflicted a knife blow on the vital part of the body which is proved fatal and again, it is followed by a second blow. This act by itself cannot be said to be in any way excusable by any extenuating factor. On the contrary, a strong inference can be formed that the intention of A1, in such a situational reality, would have been only to commit murder of the deceased, and, therefore, in our opinion, there was intention to kill deceased Bhimabhai by A1 Talaji Javanji Thakore, and as

such, in our considered opinion, his complicity and culpability is established without any doubt attracting rigors of provisions of Section 302 of the IPC.

Nonetheless, so is not the factual scenario insofar as A3 is concerned though he has inflicted blow on the head and palatial region of the deceased with an iron pipe. Giving of such blow by A3 is supported by two eye witnesses and reinforced by medical evidence. Therefore, his presence and involvement and giving of blow on the person of the deceased with iron pipe is proved without any doubt. However, there is nothing on record which would even remotely suggest and indicate that he had an intention to kill the deceased. Therefore, he cannot be held guilty for the offence punishable under Section 302 read with Section 34 of the IPC. Obviously, therefore, a question would arise as to what offence this accused has committed and what is the nature of his culpability. In the light of the evidence on record, and considering the provisions of Section 325 of the IPC, in our opinion, his culpability can be transfixed under the provisions of Section 305 of the IPC for causing grievous injuries on the body of the deceased before he died. Therefore, he is required to be convicted for the offence punishable under Section 325 of the IPC, and accordingly, the A3 is convicted for the offence under Section 325 of the IPC by setting aside his conviction and sentence under Section 302 read with Section 34 of the IPC.

#. The last question that would emerge is what should be the quantum of sentence and resultant punishment. The A1 is found guilty of offence punishable under Section 302 of IPC and he is rightly convicted and sentenced under this offence by the learned trial Court and we, therefore, confirm his conviction and sentence. This is not a rarest of rare case, and, therefore, the sentence of imprisonment for life, as awarded by the learned trial Court, is quite justified requiring no interference.

Insofar as A2 is concerned, he is wrongly convicted and sentenced under Section 302 read with Section 34 of the IPC. No offence is established against him, and, therefore, he is required to be acquitted. The A2 is, therefore, acquitted from the charges levelled against him in absence of any evidence against him.

Insofar as A3 is concerned, his culpability under Section 302 read with Section 34 of the IPC is set aside, and he is convicted under Section 325 of the IPC. The maximum punishment that can be awarded under Section 325

of IPC is of seven years. However, in the facts and circumstances of the case, the sentence and imprisonment already undergone by A3 will suffice, as he has already undergone imprisonment and sentence for a period exceeding five years, as an undertrial prisoner and after his conviction by the trial Court. Therefore, A3 is convicted under Section 325 of the IPC and is sentenced to undergo imprisonment which he has already undergone, as stated hereinabove.

##. For the foregoing reasons, the Criminal Appeal is partly allowed, and the impugned judgment of conviction and sentence dated 22nd November, 1994, passed by the learned City Sessions Judge, Ahmedabad, in Sessions Case No.84 of 1994, is modified as under:

i) The conviction and sentence of Accused No.1 Talaji Javanji Thakore under Section 302 of IPC stands confirmed.

ii) The conviction and sentence of Accused No.2 Javanji Savaji Thakore under Section 302 read with Section 34 of IPC is set aside and he is acquitted of all the charges. Since he is on bail, his bail bond shall stand cancelled forthwith.

iii) The conviction and sentence of Accused No.3 Bhaijibhai Chhanaji Thakore under Section 302 read with Section 34 of IPC is set aside and he is convicted for the offence punishable under Section 325 of the IPC. He is sentenced to imprisonment, for the period of imprisonment which he has already undergone. Since this accused is also on bail, his bail bond shall stand cancelled.

(J.N.Bhatt, Actg.C.J.)

(A.L.Dave, J.)

(sunil)